No. 01-742

In the Supreme Court of the United States

DONNOVAN BULGIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court committed reversible error by sentencing petitioner to life imprisonment for drug offenses, where the quantity of drugs involved in those offenses was not charged in the indictment or found by the jury beyond a reasonable doubt.

2. Whether a third party entrusted with petitioner's automobile had actual or apparent authority to consent to a police search of the vehicle.

3. Whether the Court should overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 263 F.3d 170 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2001. The petition for a writ of certiorari was filed on September 26, 2001, and is therefore untimely. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess cocaine with

intent to distribute it, in violation of 21 U.S.C. 846. Petitioner also pleaded guilty to illegally reentering the United States after having been deported, in violation of 8 U.S.C. 1326. The district court sentenced petitioner to life imprisonment on the drug trafficking count and to a concurrent term of 20 years' imprisonment on the illegal reentry count. Pet. App. 4a-5a. The court of appeals affirmed. *Id.* at 1a-3a.

1. Around 5 p.m. on March 2, 2000, petitioner and Grantly Calvin loaded three boxes of cocaine into petitioner's Toyota Solara automobile. Gov't C.A. Br. 3; 6/5/00 Tr. 45. Petitioner told Calvin to take the Toyota and hold it for him until the next day. Gov't C.A. Br. 3; 6/5/00 Tr. 35-39, 46. Petitioner also gave Calvin a bag of money to hold for him which Calvin hid in his attic. 6/5/00 Tr. 47. Calvin parked the Toyota at a house that belonged to the mother of Calvin's son, and Calvin kept the key to the automobile. Gov't C.A. Br. 3; 6/5/00 Tr. 35-40, 46.

The next day, March 3, 2000, petitioner was arrested and police officers questioned Calvin. Gov't C.A. Br. 4. Calvin consented to a police search of the Toyota, and he provided the officers with the key to the automobile. *Id.* at 5. Calvin told the police that petitioner had given him the car to hold. 6/05/00 Tr. 35. A police search of the vehicle uncovered boxes (with petitioner's fingerprints) containing 90 kilograms of cocaine. Gov't C.A. Br. 8.

2. Before trial, petitioner moved to suppress the 90 kilograms of cocaine seized from his Toyota, arguing that Calvin did not have authority to consent to a search of the vehicle. The district court denied the motion, noting that Calvin had loaded the boxes and driven the automobile, and that Calvin "had the authority to drive it, to park it, to hold it, and less than 24

hours [had] elapsed" since petitioner had entrusted it to him. Gov't C.A. Br. 5-6.

3. Petitioner thereafter pleaded guilty to the illegal reentry charge and, following a jury trial, he was convicted on the cocaine conspiracy charge. Pet. App. 4a-5a. During trial on the drug charge, the government presented evidence of the seizures of the 90 kilograms of cocaine from petitioner's automobile and of the more than $500,000 in cash petitioner had entrusted to Calvin, as well as testimony describing petitioner's past trafficking in multi-kilogram quantities of cocaine. Gov't C.A. Br. 6-8.

The district court sentenced petitioner to life imprisonment on the drug conspiracy charge, based in part on its determination at sentencing that 90 kilograms of cocaine were involved in the offense. Gov't C.A. Br. 10-11. Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner objected at sentencing to the imposition of a life sentence because the indictment did not allege the drug quantity involved in the offense. Gov't C.A. Br. 10-11. Petitioner was also sentenced to a concurrent term of 20 years' imprisonment on the illegal reentry count, based on the district court's determination that petitioner had been convicted of an aggravated felony prior to his deportation.[1] See 8 U.S.C. 1326(b)(2) (providing a 20-year maximum term of imprisonment for Section 1326 violators convicted of an aggravated felony before deportation). Again relying on *Apprendi*, petitioner objected to a sentence in excess of two years' imprisonment on the Section 1326 count

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[1] The presentence report (PSR), adopted by the district court (Pet. App. 13a), reflected that petitioner was convicted of two felony drug offenses in Ohio in 1988. PSR ¶¶ 46-47.

because his aggravated felony conviction had not been alleged in the indictment.

4. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-3a. The court affirmed the district court's denial of the motion to suppress the 90 kilograms of cocaine seized from the Toyota, reasoning that Calvin had apparent authority to grant permission for the police search of the vehicle when he consented to that search. *Id.* at 3a. The court of appeals observed that, even if a third party lacks the authority to consent to a search, "there is no Fourth Amendment violation if the officer conducting the search had an objectively reasonable, good-faith belief that the consent he obtained was valid." *Id.* at 2a-3a.

With respect to petitioner's sentence on the drug count, the court of appeals recognized that the district court had erred under *Apprendi* by sentencing petitioner to a life sentence based on a quantity of drugs that was not alleged in the indictment or submitted to the jury. Pet. App. 3a. The court held that the district court's sentencing error was harmless, however, "because no rational jury would have found [petitioner] guilty of conspiracy without finding that the conspiracy involved a sufficient amount of cocaine to support [petitioner's] life sentence." *Ibid.* The court noted that the drug quantity finding was supported by overwhelming evidence. *Ibid.*

The court of appeals also rejected petitioner's challenge to his 20-year sentence for illegal reentry in violation of 8 U.S.C. 1326. The court observed that it was bound by this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which holds that an allegation of a prior aggravated felony conviction in the indictment is not a prerequisite to the

imposition of an enhanced sentence under 8 U.S.C. 1326(b). Pet. App. 3a.

DISCUSSION

1. Petitioner contends (Pet. 10-15) that his life sentence on the cocaine conspiracy count should be vacated in light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because the quantity of cocaine involved in the offense was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

a. Petitioner's cocaine trafficking offense was subject to sentencing under the graduated penalties set forth in 21 U.S.C. 841(b). Petitioner's life sentence was authorized by 21 U.S.C. 841(b)(1)(B)(ii)(II), which provides for a sentence of up to life imprisonment for a recidivist defendant, such as petitioner, who is found guilty of an offense involving 500 grams or more of cocaine. His life sentence was not, however, authorized by Section 841(b)(1)(C), which provides for a sentence of up to 30 years' imprisonment for a recidivist defendant who is found guilty of an offense involving any detectable quantity of cocaine. Consequently, petitioner's life sentence depended on an increase in the statutory maximum sentence by virtue of a fact (drug quantity) that was not included in the indictment or found by the jury to have been proved beyond a reasonable doubt. Accordingly, the imposition of a life sentence on the drug conspiracy count, on the basis of a

factual determination made by the court at sentencing, was error under *Apprendi*.

The court of appeals correctly affirmed petitioner's sentence, however, finding the *Apprendi* error harmless in light of the overwhelming drug quantity evidence, under which "no rational jury would have found [petitioner] guilty of conspiracy without finding that the conspiracy involved a sufficient amount of cocaine [500 grams] to support [petitioner's] life sentence." Pet. App. 3a.

b. Petitioner argues (Pet. 10-15) that his life sentence must be vacated because the *Apprendi* error is jurisdictional and requires automatic reversal. In *United States* v. *Cotton*, cert. granted, No. 01-687 (Jan. 4, 2002), the question presented is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals, on plain error review, to automatically vacate the enhanced sentence. The petition in this case accordingly should be held pending the Court's decision in *Cotton* and then disposed of accordingly.

2. Petitioner also renews his argument (Pet. 16-17) that Calvin did not have the actual or apparent authority to consent to the search of the Toyota. That fact-bound claim was correctly rejected by both courts below and does not merit further review.

A search of property, without warrant or probable cause, is permissible under the Fourth Amendment when justified by valid consent. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). The consent must be voluntary, and the person giving the consent must have authority to do so, *United States* v. *Matlock*, 415 U.S. 164, 171 (1974), or must reasonably appear to have the authority to do so, *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). A third party may validly consent to a search of

property if the third party possesses common authority over or other sufficient relationship to the property to be searched. *Matlock*, 415 U.S. at 171 & n.7 (noting the significance of "joint access or control" over the property).

In this case, the police officers were advised by Calvin that petitioner had given him the Toyota to take to the residence, which was owned by friends of Calvin's, to "hold for him." 6/5/00 Tr. 35 ("I am supposed to hold on to it."); *id.* at 38-40. Calvin had the keys and he had driven the car to the location where it was parked; the police also had seen petitioner and Calvin in the vehicle together on the previous day. 6/5/00 Tr. 38-40. Although petitioner argues that the authority he granted to Calvin over the Toyota terminated when Calvin parked the car (Pet. 17), that disputed factual question was resolved against him in the district court (6/5/01 Tr. 79), and the court of appeals correctly held that Calvin had at least apparent authority to consent to the search (Pet. App. 3a). That determination involves the application of settled principles to the particular facts of this case and does not warrant further review.

3. Petitioner also challenges (Pet. 17-20) his 20-year concurrent sentence for illegally reentering the United States after deportation. That sentence was authorized by 8 U.S.C. 1326(b)(2), which provides a 20-year maximum term of imprisonment for Section 1326 violators who, like petitioner, have been convicted of an aggravated felony before deportation. In the absence of an enhancement based on an alien's prior convictions,

Section 1326(a) establishes a two-year maximum for the illegal reentry offense.[2]

In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), the Court held that neither 8 U.S.C. 1326 nor the Constitution requires that a Section 1326 indictment allege the fact of a defendant's prior aggravated felony conviction before the sentencing court may impose an enhanced sentence under Section 1326(b)(2) based on that conviction. Petitioner contends (Pet. 17-19) that *Almendarez-Torres* should be overruled in light of this Court's decision in *Apprendi* and that his sentence on the illegal entry count therefore be vacated because the indictment did not allege his prior aggravated felony conviction.

Almendarez-Torres, however, survives *Apprendi* and was correctly decided. As the Court stressed in *Almendarez-Torres*, that case involved recidivism, which is "as typical a sentencing factor as one might imagine." 523 U.S. at 230. The Court found no federal statute that clearly makes recidivism an element of an offense that must be charged in an indictment. *Ibid.* *Almendarez-Torres* was therefore markedly different from *Apprendi*, which involved the element of mens rea, "perhaps as close as one might hope to come to a core criminal offense 'element.'" 530 U.S. at 493. By holding in *Apprendi* that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," *id.* at 476,

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[2] Section 1326(b)(1) also authorizes a maximum sentence of ten years' imprisonment in the case of an offender with a prior felony conviction that does not meet the definition of an aggravated felony, or an offender with three misdemeanor convictions involving drugs or crimes against the person.

the Court did not disturb the holding of *Almendarez-Torres* that prior convictions may be treated as sentencing factors.

The Court was correct in declining to disturb *Almendarez-Torres*. Principles of notice and fundamental fairness do not require that an indictment charge, or that a jury find, that a defendant had a prior conviction in order for the defendant to be sentenced to a longer term as a recidivist. A defendant cannot claim surprise by the fact of such a conviction, because he previously experienced the criminal process that resulted in the conviction. Nor will a prior conviction ordinarily present any significant factual dispute for the fact-finder to resolve. As the Court observed in Apprendi, "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt," 530 U.S. at 496, which *Almendarez-Torres* permits, and allowing a judge rather than a jury to find in the first instance facts that "relate to the commission of the offense itself," *ibid.* (internal quotation marks omitted). As the Court pointed out in *Jones* v. *United States*, 526 U.S. 227, 249 (1999), "[o]ne basis for that possible constitutional distinctiveness" of the treatment of prior convictions "is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, * * * a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." See *Apprendi*, 530 U.S. at 488 (noting the "certainty [in *Almendarez-Torres*] that procedural safeguards attached to any 'fact' of prior conviction").

This case moreover would be a poor vehicle in which to address the constitutional question posed by petitioner with respect to *Almendarez-Torres* because his Section 1326 sentence runs concurrently with the life sentence imposed on his drug conspiracy conviction. Even if petitioner's sentence on the drug count were limited to the 20-year maximum term of imprisonment authorized by 21 U.S.C. 841(b)(1)(C) for cocaine trafficking offenses involving any amount of cocaine, the concurrent sentence on the Section 1326 illegal reentry count would not add to petitioner's total term of imprisonment.

CONCLUSION

With respect to petitioner's claim that his life sentence on the drug conspiracy count constituted reversible error (identified by petitioner as questions presented I and II (Pet. i)), the petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Cotton*, cert. granted, No. 01-687 (Jan. 4, 2002), and then disposed of accordingly. In all other respects, the petition should be denied.

Respectfully submitted.

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